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No. 635

IN THE

Supreme Court of the United States

October Term, 1966

PUBLISHERS' ASSOCIATION OF NEW YORK CITY, ET AL.,
Petitioners

vs.

NATIONAL LABOR RELATIONS BOARD and NEW YORK TYPOGRAPHICAL UNION NO. 6,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF DETROIT NEWSPAPER PUBLISHERS ASSOCIATION, AMICUS CURIAE, IN SUPPORT OF PETITION

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INDEX

	Page
Interest of Amicus Curiae	1
Reasons for Granting The Writ	2
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Brown Food Stores, 137 NLRB 73 (1962), enf. den. sub nom *Brown* v. *NLRB*, 319 F 2d (10th Cir. 1963), Aff'd 380 U. S. 278 (1965) 4, 11

Buffalo Linen Supply Co., 109 NLRB 447 (1954), enf. den, sub nom, *Truck Drivers Local Union* v. *NLRB*, 231 F 2d 110 (2d Cir. 1956), rev'd 353 U.S. 87 (1957) 2, 3, 4, 8

Evening News Assoc., 154 NLRB No. 121 (1965); 154 NLRB No. 123 (1965) 2, 3, 4

General Teamsters Local Union No. 324, 127 NLRB 488 (1960) 9

Operating Engineers Union (Cascade Employers Assoc.), 141 NLRB 469 (1963) 9, 10

Publishers Assoc. of N. Y. City, 156 NLRB No. 16 (1965) 4

United Mine Workers v. *Pennington*, 381 U.S. 657 (1965) 10

Statutes:

Section 8(b)(1)(B), *National Labor Relations Act* as amended (61 Stat. 136, 29 U.S.C. Secs. 151 et seq.) 8, 9, 10

Other:

Cox, *Cases on Labor Law*, 151 (4th Ed. 1958) 7

Cox, *The Uses and Abuses of Union Power*, 35 Notre Dame Lawyer 624 7

Page

Gregory, *Labor Union Power and the Public Interest, Introduction,* 35 Notre Dame Lawyer 591, 592 6
Meltzer, *Lockouts Under the Taft-Hartley Act,* 24 U. Chi. L. Rev. 70 (1956) 4, 8
Note, 41 N.Y.U.L. Rev. 651 (May 1966) 5
Note, 44 Texas L. Rev. 1047 (April 1966) 5
Report of the Committee on Development of the Law under National Labor Relations Act, Section of Labor Relations Law of the American Bar Assoc.:
(1959) 5
(1966) 5
Taylor, Preface to Freidin, *The Taft-Hartley Act and Multi-Employer Bargaining* 7
Senate Report 105, p. 21, 1 Legis. Hist. 427 9
Quarterly Report of General Counsel (NLRB) for period ending September 30, 1966 10

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BRIEF OF DETROIT NEWSPAPER PUBLISHERS ASSOCIATION, AMICUS CURIAE, IN SUPPORT OF PETITION

With the consent of all parties, Detroit Newspaper Publishers Association files this Brief *amicus curiae* in support of the petition of the Publishers' Association of New York City, *et al*, for a writ of certiorari to review the decision of the Court of Appeals for the Second Circuit.

INTEREST OF AMICUS CURIAE

The interest of Detroit Newspaper Publishers Association in the proper resolution of the multi-employer bargaining question at bar is that of any party who has for many years engaged in bargaining on a multi-employer basis. More particularly, the newspaper publishers in Detroit, as well as in New York and virtually every other major city in

the United States, have historically bargained through an employer association with a number of multi-employer unions, including the Typographical Union. Further, *amicus* was the respondent in the landmark Board decisions on the question of employees' right to dissolve employer groups.[1] Those two cases have been consolidated and are presently pending in the Court of Appeals for the Sixth Circuit on petitions for review and enforcement. *Detroit Newspaper Publishers Association, et al,* v. *National Labor Relations Board,* Nos. 16,855 and 16,856, Sixth Circuit.

REASONS FOR GRANTING THE WRIT

1. The question presented by this case is whether employers who long have been associated for the purpose of bargaining with their respective employee groups (which groups are combined into a multi-employer union), violate Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act, as amended, if they do not dissolve their associated bargaining group upon the mere written demand by the multi-employer union that they do so.

The present resolution of this question by the Court of Appeals for the Second Circuit (Pet. App. A, pp. 17-25) was presaged by its *dictum* expression of some ten years earlier (*Truck Drivers Union* v. *NLRB,* 231 F. 2d 110), that it could see "no rational basis" for distinguishing a union "withdrawal" from an employer withdrawal. 231 F. 2d 110 at 116. "[I]t would seem only fair", the court remarked in 1956, "that the union be accorded the same privilege of voluntary withdrawal as is enjoyed by the employer . . ." 231 F. 2d 110 at 115.

The Court of Appeals in its present (July 25, 1966) decision, stressed the "apparent equality of treatment" in the

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[1] *Evening News Ass'n,* 154 NLRB No. 121 (1965) (P.A. 36a-57a); 154 NLRB No. 123 (1965).

Board's extension of the "withdrawal"[2] right to employees (Pet. App. A, p. 20). The Court of Appeals' 1956 *dictum* (as well as its then decision that associated employers could not meet a whipsaw strike with a lockout) was based on a view of the legislative history which this Court, after a review of the pertinent legislative history, expressly rejected. *NLRB* v. *Truck Drivers Local Union No. 499 (Buffalo Linen)*, 353 U.S. 87 at 94 (1957).

This Court expressly reserved decision as to the "equal withdrawal right" question until such time as "it is properly before us." *Buffalo Linen*, 353 U.S. 87 at 94, n. 22. The question now is squarely presented in the instant case and the question again has come to this Court by way of the Court of Appeals for the Second Circuit.

The Court of Appeals decided the question as it had in 1956. While offering in its present decision no analysis of the Taft-Hartley Act and its legislative history, the Court echoed its conclusion of ten years before that "the fierce [congressional] debates over multiple bargaining" contain no guide for resolution of multi-employer questions, the debates demonstrating only "the lack of agreement thereon" (Pet. App. A, p. 32). The National Labor Relations Board shared the Second Circuit's conclusion that Congress has provided no assistance in the resolution of the "with-

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[2] Union "withdrawal" is a misnomer which reveals a crucial error in the Court of Appeals' and the Board's analysis in the present case. As dissenting Board Member Brown stated in *Evening News Ass'n* (P.A. 51a-52a):

> "'It is apparent that an employer's right to withdraw its participation in, and negotiation through, an association or group is entirely different from the asserted right to require an employer to withdraw. In fact, the term "union withdrawal" is misleading, for a union does not withdraw unilaterally, but compels an employer to forego group action and pursue an independent course. Thus, when a union withdraws, it remains unaffected as an entity while requiring a change in the very identity, nature and composition of the employer with whom bargaining is to be conducted.'"

drawal" question.[3] Both tribunals in effect have treated the question as an administrative one only with the Taft-Hartley Act somehow not applicable.[4]

The Board's commencement of its analysis of the withdrawal question with the conclusion that exit rights must be "equal", was anticipated by at least one respected commentator on labor law, Professor Bernard Meltzer, of the University of Chicago Law School. Professor Meltzer, in his 1956 examination[5] of the "basic considerations pertinent to mutual rights of withdrawal," warned that " . . . the argument for equality of treatment has its customary appeal . . . " But, he continued, the equality approach "involves the risk of over-simplification." *Ibid.*

Professor Meltzer stressed the central role that the Taft-Hartley Act's legislative history must play in the resolution of the "withdrawal" question:

> "Before this [equality] argument can be appraised, a prior question must be faced: What are

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[3] See *Evening News Association*, 154 NLRB No. 121 (1965) (Pet. App. 36-57a); *Publishers Assoc. of N.Y. City*, 156 NLRB No. 16 (1965) (Pet. App. 12-17a).

[4] The Board (P.A. 47a) and the Court of Appeals (Pet. App. A, pp. 17-25) each apparently relied upon this Court's statement in *Buffalo Linen* that "Congress . . . intended to leave to the Board's specialized judgment, the inevitable questions concerning multi-employer bargaining bound to arise in the future." 353 U.S. 87, 96. Certainly, however, the Board's "specialized judgment" does not control where Congress has spoken. What the lower tribunals did not emphasize is this Court's reference to the above-quoted *Buffalo Linen* language in *Labor Board* v. *Brown*, 380 U.S. 278 at 291-292, where this Court said, in affirming the Tenth Circuit's reversal of the Board's exercise of judgment in resolving a multi-employer question:

> "Reviewing courts are not obligated to stand aside and rubber-stamp their affirmance of administrative decisions that they deem *inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.*"
> " . . . '[t]he deference owed to an expert tribunal cannot be allowed to slip into judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.'"

[5] See Meltzer, *Lockouts Under the Taft-Hartley Act*, 24 U. Chi. Law Review 70 at 94 (1956).

> the reasons for sanctioning the multi-employer unit? If, as the pertinent legislative history suggests, such units are sanctioned as an offset to union power, unlimited rights of union withdrawal from an established unit are as paradoxical as similar rights to an employer to abandon collective bargaining."

This warning against a simplistic resolution of the fundamental joint bargaining question of whether employees may dissolve employer groups, was reiterated by the Section of Labor Relations Law of the American Bar Association. In that Section's 1959 "Report of the Committee on Development of the Law under National Labor Relations Act",[6] the Committee noted the conflict between "equality" of union "withdrawal" and the legislative purpose of the Act, and stated:

> "Such equality seems on the surface to be fair and proper. But does it square with the reasons for [Congress'] sanctioning the multi-employer unit?" *Id.* p. 18.

The Committee urged that the Board's resolution of the withdrawal question be "accompanied by an exploration of the basic considerations behind the legislative sanction of multi-employer units." *Ibid.*

One need only review the Board decisions[7] and the Court of Appeals decision (Pet. App. A, pp. 17-25) to see that the fundamental and far-reaching "withdrawal" question has made its way to the present stage of litigation without any

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[6] Section of Labor Relations Law, American Bar Association (1959). In the 1966 Report of the Committee on Development of the Law under the National Labor Relations Act, the Committee noted that the "key logical weakness" in the *Evening News Ass'n* decision was that identified by dissenting Board Member Brown (see f.n. 2, *supra*) and predicted that the "decision may well augur a complete upheaval in multi-employer bargaining . . . " A.B.A. Labor Law Section Report 423-424 (1966). Law Review commentary has likewise been critical. See 41 N.Y.U.L. Rev. 651, (May 1966), and 44 Texas L. Rev. 1047 (April 1966).

[7] See FN 3, *supra*.

real attempt to examine the legislative history to ascertain the purpose of Congress.

2. It is respectfully submitted that there is more in the legislative history than that noted by the Court of Appeals: "fierce debates" ending in a "lack of agreement" (Pet. App. A, p. 23). This Court found much more, in resolving the *Buffalo Linen* question. And, while there was in that case no occasion to search the history in regard to the expressly-reserved "withdrawal" question, it is submitted that this Court should now address itself to that history.

For, fully examined, the Taft-Hartley Act and its legislative history show that Congress in 1947 intended to give, and did give, employers a right to group on their side of the bargaining table, and to stay grouped so long as their respective employee groups remain combined in a multi-employer union.

A review of the history shows that as the Senate and House of Representatives in 1947 drafted, debated and adopted the Taft-Hartley Amendment, these Congressional bodies became deeply involved in an examination of multi-employer bargaining. Surveying the development of labor relations in the twelve years following the 1935 enactment of the Wagner Act, Congress expressed clear concern over the emergence of the powerful, broadly-organized unions which dominated the labor scene. There was an evinced feeling that in the short twelve years since the adoption of the Wagner Act, the formerly fragmented employees had perhaps over-organized in creating their multi-employer unions. As one commentator put it, unions "grew big overnight—exactly what Congress wished at that time." But, in 1947, "union activity . . . suggested to Congress that it may have overshot the mark." Gregory, *Labor Union Power and the Public Interest* (Introduction), 35 Notre Dame Lawyer 591, 592. One of the broad goals of Congress in Taft-Hartley was equalization of the positions of employer and union;

the achievement in Professor Cox's words, of "a new balance" . . . "[a] redress [of] the balance of power in the collective bargaining process." Cox, *Cases on Labor Law* 151 (4th Ed. 1958).

A specific reaction of many in Congress was to propose breaking up, or otherwise restricting, the broad unions and the multi-employer approach that they had created.[8] That Congress' disenchantment with multi-employer bargaining was not so much a concern about such bargaining as it was about the large unions which had caused the creation of the phenomenon, is shown by specific proposals presented. Professor Cox has briefly summarized these 1947 efforts:

> "The Hartley bill and Ball amendment of 1947 sought to limit the size and power of unions by reference to the product market. They proposed to eliminate 'industry-wide bargaining' (a misnomer for industry-wide unionization) by confining the bargaining rights of each union to the employees of a single employer, and then forbidding the several company-wide unions to coordinate their negotiations either directly or through an international union." Cox, *The Uses and Abuses of Union Power*, 35 Notre Dame Lawyer 624, 630.

While Congress rejected the break-up of broad unions (*Buffalo Linen*, 353 U.S. 87 at 95), it is clear that the decision cannot be taken as indication that Congress after debate had decided that these unions and their power were not a problem; rather, Congress decided to follow a positive approach in restoring some equality to the employers who face the employee groups amalgamated in these broad unions. This restoration of balance was to be achieved by, and is embodied in, Congress' ratification, approval and protection of the long-standing practice of employers or-

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[8] See e.g. Taylor, *Preface* to *Freidin, The Taft-Hartley Act and Multi-Employer Bargaining* at iii.

ganizing into units correlative in scope to that of the multi-group unions which they face.

Thus this Court in *Buffalo Linen* rejected out of hand the conclusion of the Court of Appeals for the Second Circuit (in *Truck Drivers Local Union* v. *NLRB*, 231 F. 2d 110 (1956)) that "the inaction of Congress with respect to multi-employer bargaining . . . indicate(d) an intention to leave the resolution of this problem to future legislation." This Court rather decided that the "compelling conclusion" from a review of the legislative history was that Congress had approved the practice of employers joining together for bargaining. 353 U.S. 87 at 95-96, 94. It was noted that "multi-employer bargaining long antedated the Wagner Act . . . ", and that since that 1935 Act "this basis of bargaining has had its greatest expansion . . . because employers have sought through group bargaining to match increased union strength." 353 U.S. 87 at 94-95. In approving the use of the lockout by an organized group of employers, this Court based its approval of the group's use of the lockout on Congress' approval of employer group bargaining "as a means of bargaining on an equal basis with a large union . . . " 353 U.S. 87, 94-95.[9]

Beyond the intent and purpose evident in the overall legislative history, Congress, by inserting a specific new section into the 1947 Act, decisively confirmed its view of employer group bargaining. The addition of the new sec-

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[9] In this connection see, Meltzer, *Lockouts Under the Taft-Hartley Act*, 24 U. Chi. L. Rev. 70 at 88 (1956), where he notes that those who prevailed against the breaking up of multi-employer bargaining, urged the following:

> "Opponents of such limitations urged that the growth of union power made it necessary for smaller employers to bargain on a group basis to achieve approximate 'equality' with unions and that multi-employer bargaining was necessary to protect individual employers against divide-and-conquer tactics, i.e., to prevent the union from singling out an individual employer, securing its demands from him and thereby setting standards for his competitors."

tion, 8(b)(1)(B),[10] made it clear that Congress was not only approving the long-standing practice of the creation of employer groups for bargaining, but that Congress intended to and did give employer groups protection against union attempts to break up such groups against their will.

The Senate Labor Committee Report stated the purpose of 8(b)(1)(B) as:

> "Section 8(b)(1): This proscribes unions and their agents from interfering with, restraining, or coercing employers in the selection of their representatives for the purpose of collective bargaining or the settlement of grievances. *Thus, a union or its responsible agents could not, without violating the law, coerce an employer into joining or resigning from an employer association which negotiates labor contracts on behalf of its members;* also, this subsection would not permit a union to dictate who shall represent an employer in the settlement of employee grievances, or to compel the removal of a personnel director or supervisor who had been delegated the function of settling grievances." Senate Report 105, p. 21, quoted in 1 Legis. Hist. 427. (Emphasis added.)

Section 8(b)(1)(B) has been so applied. In *General Teamsters Local Union No. 324*, 127 NLRB 488 (1960), the Board held that a union had violated Section 8(b)(1)(B) by activity aimed at "compelling the employers to abandon the Association as their collective bargaining representative and to substitute individual for group bargaining." And in *Operating Engineers Union (Cascade Employers Assoc.)*, 141 NLRB 469, 474 (1963), the Board condemned, as a violation of the 8(b) sections, a union strike attempt "to break . . . employers off from the multi-employer unit represented by [the employer association]."

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[10] Section 8(b)(1)(B), in pertinent part, provides:

> "It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances; . . ."

These Board cases do not speak of the 8(b)(1)(B) right as simply the procedural right to bargain through chosen personnel or entities, but rather make clear that the Board, until the advent of the present "withdrawal" litigation, recognized that Congress, in enacting 8(b)(1)(B), gave employers a substantial right, that of banding, and staying, together in bargaining as a group with a multi-employer union. There is nothing in these Board cases to suggest that 8(b)(1)(B) is honored if the union "allows" the association to continue as the representative of the employers in "separate and individual" bargaining; rather the 8(b)(1)(B) right of employers is stated, by the Board, to be the right to *stay grouped;* to (in the Board's words) not be "broken off" one from the other. 141 NLRB 469, 474 (1963).

Yet, remarkably, 8(b)(1)(B) is nowhere referred to in either the Board or Court of Appeals decisions in the present case.

CONCLUSION

This Court resolved the multi-employer question in *Buffalo Linen* only after a search for, and an analysis of, the relevant legislative history. The more fundamental multi-employer question posed by the instant litigation[11] has been

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[11] For instance, aside from exposure to whipsaw strikes and the Board's restrictive view of the availability of the lockout (see Quarterly Report of General Counsel for period ending September 30, 1966 (63 L.R.R. 197 at 198-199), the importance to employers of their right to join together and to remain together in a multi-employer bargaining group is underscored by this Court's recent decision in *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965), where Mr. Justice White said at p. 664:

"It is true that wages lie at the very heart of those subjects about which employers and unions must bargain and the law contemplates agreements on wages not only between individual employers and a union but agreements between the union and employers in a multi-employer bargaining unit. *Labor Board* v. *Truck Drivers Union*, 353 U.S. 87, 94-96. The union benefit from the wage scale agreed upon is direct and concrete and the effect on the product

to date decided without such consideration of the Congressional purpose, notwithstanding this Court's recent admonition that administrative boards and reviewing courts are not free to ignore "a statutory mandate or . . . the congressional policy underlying a statute." *NLRB* v. *Brown*, 380 U.S. 278 (1965).

For these reasons it is respectfully urged that the petition for a writ of *certiorari* be granted.

Respectfully submitted,

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[11] market, though clearly present, results from the elimination of competition based on wages among the employers in the bargaining unit, which is not the kind of restraint Congress intended the Sherman Act to proscribe. [Citations Omitted.] We think it beyond question that a union may conclude a wage agreement with the multi-employer bargaining unit without violating the antitrust laws. . . ."